Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

LUIS REYES-GAONA

Petitioner,

v.

NORTH CAROLINA GROWERS ASSOCIATION, INC., and DEL-AL ASSOCIATES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

The Age Discrimination in Employment Act (ADEA), makes it unlawful for an employer "to fail or refuse to hire . . . any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1). The question presented in this petition is:

> Did the Fourth Circuit err by failing to apply the ADEA to a hiring discrimination claim brought by a foreign national against U.S. employers concerning employment in the United States under a U.S. temporary employment visa program, contrary to the decisions of all other courts which rely on the location of the workplace when determining whether an employment discrimination claim invokes extraterritoriality?

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Petitioner Luis Reyes-Gaona respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit entered May 22, 2001, 250 F.3d 861, is reprinted in the Appendix at A-1. The opinion of the U.S. District Court for the Middle District of North Carolina, entered June 22, 2000, 83 Fair Empl. Prac. Cases (BNA) 891 (M.D. N.C. 2000), is reprinted in the Appendix at A-11.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on May 22, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621-634, are reprinted at App. A-17 and A-18. Included are § 4(a)(1), 29 U.S.C. § 623(a)(1), § 4(f)(1), 29 U.S.C. § 623(f)(1), and § 11(f), 29 U.S.C. § 630(f).

STATEMENT OF THE CASE

1. Statement of Facts

In May 1998, the Respondents, both U.S. employers, refused to hired the Petitioner, Luis Reyes-Gaona, for agricultural work in the United States based solely on his age. Reyes-Gaona, a citizen of Mexico, went to the Mexico office of Respondent Del-Al Associates, Inc. ("Del-Al"). Del-Al is a U.S. company that recruits and hires agricultural workers in Mexico for Respondent North Carolina Growers Association ("NCGA"), the members of NCGA, and other employers located in North Carolina and other states. App. A-2. Reyes-

Gaona sought to be one of the Mexican citizens hired by the Respondents to work in North Carolina under the U.S. Department of Labor's H-2A visa program. *Id.*

Under the Immigration and Nationality Act (INA), agricultural employers who anticipate a labor shortage for temporary or seasonal jobs may petition the Attorney General for permission to recruit and hire foreign workers on a temporary, non-immigrant basis pursuant to the H-2A visa program. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c), 1188. The Attorney General has delegated to the Commissioner of the Immigration and Naturalization Service ("INS") responsibility to accept and adjudicate such petitions. 8 C.F.R. § 2.1. Before the INS will approve an application, the employer must apply to the U.S. Department of Labor for a certification that there is a domestic labor shortage and that employing foreign workers will not adversely affect the wages and working conditions of similarly employed American workers. 8 U.S.C. §§ 1188(a)(1); 1184(c)(1); App. A-2.

Respondent NCGA annually hires thousands of foreign H-2A workers from Mexico to work in North Carolina as temporary or seasonal agricultural employees under the H-2A program. NCGA, as an employer, and Del-Al, as an agent for NCGA and NCGA's member-growers, secure short-term, temporary visas for foreign workers using the H-2A system.

The Del-Al representative, Cipriano Molina, told Reyes-Gaona that NCGA would not accept an application from a worker over 40 years of age. Molina stated that the only way a worker over 40 would be hired was if the individual had worked for a NCGA member in the past and that member requested the individual by name for future seasons. App. A-2.

2. Proceedings Below

On January 28, 2000, Luis Reyes-Gaona filed a complaint in the United States District Court for the Middle District of North Carolina against NCGA and Del-Al. Reyes-Gaona alleged that he applied for and was "qualified" for

employment as an agricultural worker with the Respondents under the federal H-2A visa program but was denied such employment based solely on his age. Specifically, he claimed that the Respondents told him and other individuals that they would not be considered for employment because they were over the age of 40.

Both Respondents filed motions to dismiss under Fed. R. Civ. P. 12(b)(6). The district court granted these motions and entered final judgment against Mr. Reyes-Gaona on June 22, 2000. In dismissing Reyes-Gaona's claims, the district court relied on the decisions of the U.S. Court of Appeals for the Fourth Circuit in *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998) (en banc) (per curiam), *cert. denied*, 525 U.S. 1142 (1999) and *Chaudhry v. Mobil Oil Corp.*, 186 F.3d 502 (4th Cir. 1999). In *Egbuna* and *Chaudhry*, the Fourth Circuit held that when an applicant for employment is a foreign national, "being 'qualified' for the position is not determined by the applicant's capacity to perform the job – rather, it is determined by whether the applicant was an alien authorized for employment in the United States at the time in question." *Egbuna*, 153 F.3d at 187; *Chaudhry*, 186 F.3d at 505.[1/]

Although Reyes-Gaona stated in his complaint that he "was, and remains qualified to perform the labor for which the defendants sought employees," the district court dismissed the complaint because it was "not a foregone conclusion" that Reyes-Gaona would have received an H-2A visa. App. A-14. The district court held so despite the fact that the record did not disclose any objective basis, other than age, on which

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[1/] In ruling that *Egbuna* barred Reyes-Gaona's claims, the district court disregarded Reyes-Gaona's argument that the federal H-2A visa program's unique legal framework made his case vastly different from both *Egbuna* and *Chaudhry*. In particular, Reyes-Gaona emphasized that since employers under the H-2A program are responsible for obtaining the temporary employment visas for workers only after they are selected, the reasoning of *Egbuna* and *Chaudhry* was inapplicable to his claim.

Reyes-Gaona would have been denied an H-2A visa had the Respondents requested one on his behalf.

Reyes-Gaona appealed. On May 22, 2001, the Fourth Circuit affirmed the district court's dismissal, however, on entirely different grounds. The Fourth Circuit held that the ADEA does not protect foreign nationals who, while still in a foreign country, apply for jobs in the United States. Basing its decision on the presumption against the extraterritorial application of U.S. laws, the Fourth Circuit rejected the arguments by Reyes-Gaona, and the Equal Employment Opportunity Commission (EEOC) as *amicus curiae*, that his case does not require applying the ADEA extraterritorially because the work he applied for was to be performed in the United States. Instead, the Fourth Circuit held that "[n]othing in the ADEA provides that it shall apply anytime the workplace is in the United States regardless of the nationality of the applicant or the country in which the application was submitted." App. A-7.

REASONS FOR GRANTING THE WRIT

This case presents two circumstances which ordinarily warrant review by this Court. First, the decision by the court below creates a clear conflict among the circuit courts regarding the standard for determining when a claim requires an employment discrimination law to be applied extraterritorially. In holding that the ADEA, and by implication other federal civil rights laws, do not apply if the claimant is a foreign national who applies for employment in the United States while still in a foreign country, the Fourth Circuit diverges from the decisions of other federal circuits that hold that the site of the workplace determines whether a claim invokes extraterritoriality.

Second, review by this Court is particularly appropriate given the significance the decision below has regarding a myriad of federal employment temporary visa programs. Under the H-2A, as well as the H-2B, H-1B and other federal temporary visa programs, United States employers are granted express permission to go abroad to

recruit and to hire hundreds of thousands of foreign nationals for employment within the United States. The Fourth Circuit's decision allows U.S. employers taking advantage of these programs to discriminate based on age, and by implication other protected categories, when recruiting and hiring abroad for jobs here in the United States.[2/] The ability of U.S. employers to hire foreign nationals for employment in the United States without the prohibitions of this country's employment discrimination statutes, creates a disincentive to hire U.S. workers. Thus, the Fourth Circuit's ruling threatens to undermine the goals of both federal civil rights and immigration laws. This will undoubtedly have a negative impact on employment opportunities for American workers.

Given the increasing internationalization of the U.S. labor force and the globalization of the economy, the applicability of this country's employment discrimination laws to U.S. employers' foreign recruitment and hiring practices raises an important question of federal law that has not been, but should be, settled by this Court. This Court should grant review to clarify the standard for determining when an employment discrimination claim requires a statute to be applied extraterritorially.

[2/] "The ADEA provisions defining 'employee' and outlining foreign employment are virtually identical to those contained in Title VII." *Iwata v. Stryker Corp.*, 59 F. Supp. 2d 600, 604 (N.D. Tex. 1999) (internal footnotes omitted). *Compare* 42 U.S.C. § 2000e(f) *with* 29 U.S.C. § 630(f) *and* 42 U.S.C. § 2000e(1)(b) *with* 29 U.S.C. § 623(f)(1). Therefore, the Fourth Circuit's *Reyes-Gaona* decision could be interpreted to allow U.S. employers to discriminate on the basis of race, color, gender and religion as well as age when recruiting and hiring abroad. As this Court has noted, because of the similar structure and purposes of Title VII and the ADEA, interpretations of one statute are often used in interpreting the other. *See, e.g., Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979).

I. THE FOURTH CIRCUIT'S DECISION THAT THE SITE OF THE JOB APPLICATION DETERMINES THE APPLICABILITY OF THE ADEA STANDS IN STARK CONTRAST WITH THE DECISIONS OF OTHER FEDERAL CIRCUITS THAT LOOK TO THE SITE OF THE PROSPECTIVE WORKPLACE.

The Fourth Circuit's holding that the ADEA does not apply when a foreign national is applying outside of the United States for proposed employment in the United States creates a stark conflict regarding the standard for extraterritorial application, as all other courts have held that whether an employment discrimination claim is extraterritorial is determined by the location of the workplace. In concluding that Reyes-Gaona's claim would require it to apply the ADEA extraterritorially, the Fourth Circuit gave no weight to the fact that the work Reyes-Gaona was applying for would have been performed exclusively in North Carolina. Instead, the Fourth Circuit considered it determinative that Reyes-Gaona "is a foreign national who applied in a foreign country for work in the United States." App. A-3. In so holding, the Fourth Circuit stands alone.

Other courts of appeals, as well as several district courts[3/], have held that for purposes of determining whether a particular employment action is extraterritorial in nature, the place of employment or prospective employment, not where the decision was made, or where the application was submitted, is the decisive factor. These decisions are consistent with the principle that although employment of foreign nationals *outside of the United States* falls beyond the scope of the ADEA,[4/] employment of foreign nationals *within*

[3/] *See* discussion *infra* pp. 12-16.

[4/] S. Rep. No. 98-467, 27-28 (1984), reprinted in 1984 U.S.C.C.A.N. 2974, 3000-01 (emphasizing that the 1984 amendment to the ADEA extending its protections to U.S. citizens employed overseas for U.S.

(continued...)

the United States does not invoke extraterritoriality and therefore is covered by the ADEA.[5/]

As the Fourth Circuit emphasized, most of the cases concerning the standard for extraterritoriality present the reverse situation of that presented by Reyes-Gaona's case, i.e., the plaintiffs were working or applying for positions abroad versus applying for a position within the United States.[6/] That Reyes-Gaona's case is the "reverse" of the others does not eliminate the bottom-line conflict with respect to the standard for extraterritorial application. Each of these cases, as described below, required the court to undertake the same analysis as the Fourth Circuit undertook in Reyes-Gaona's case. Each court had to decide what to focus on to determine whether the claim required the statute in question to be applied extraterritoriality. Disregarding the location of the workplace, the Fourth Circuit focused on where Reyes-

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[4/](...continued)
employers "does not apply to foreign nationals working for [U.S.] corporations in a foreign workplace . . . ."); *Iskander v. American University of Beirut*, 1999 U.S. Dist. LEXIS 12195 *6 (S.D.N.Y. Aug. 9, 1999) ("The ADEA does not extend to foreign nationals working abroad for American companies or their subsidiaries."); *Iwata v. Stryker Corp.*, 59 F. Supp. 2d 600, 604 (N.D. Tex. 1999) ("Non-citizens working outside the United States are not protected because they are not considered employees [under either Title VII or the ADEA].").

[5/] *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) (construing the phrase "any individual" as evidence that "Title VII was clearly intended to apply with respect to the employment of aliens inside any State."); *O'Loughlin v. The Pritchard Corp.*, 972 F. Supp. 1352, 1363 (D. Kan. 1997) ("The phrase 'any individual' suggests that the [ADEA] in general protects noncitizens of the United States from unlawful discrimination.").

[6/] "The fact that some suits were barred because of the international location of the employee's workstation says nothing about whether a foreign national can file suit under the ADEA merely because the proposed workstation is in the United States." App. A-7.

Gaona was at the time he applied for the position in the United States. All other courts have looked to the site of the prospective workplace and ignored the site of the job application.

The fact that Reyes-Gaona applied for employment while still in Mexico should not be determinative. Nor is the fact that the employment "decision" was communicated to Reyes-Gaona in Mexico, where the defendants' agent denied Reyes-Gaona the opportunity to participate in the H-2A program based solely on his age. It is also irrelevant that the discriminatory hiring policy most likely was promulgated by the defendants inside the United States. The critical fact is that, absent the discriminatory refusal to hire Reyes-Gaona, all his work would have been performed inside the United States. Under the principle that it is the location of the prospective work station that determines whether the ADEA applies to a failure to hire claim, Reyes-Gaona's age discrimination claim falls squarely within the reach of the ADEA.

The Fourth Circuit also emphasized that many of the cases relied on by the Petitioner "involved events that preceded the 1984 amendments." App. A-7. In each of these pre-Amendment cases,[7/] the courts concluded that the ADEA did not apply to Americans employed outside the United States by U.S. employers. In response to this line of cases,

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[7/] Several of the cases cited by Reyes-Gaona and by the EEOC as *amicus curiae* in the proceedings below that involved events preceding the 1984 amendments are discussed below. *See, e.g., Lopez v. Pan Am World Servs., Inc.*, 813 F.2d 1118 (11th Cir. 1987); *Pfeiffer v. Wm Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985); and *Cleary v. U.S. Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984). Other circuit court cases involving pre-1984 events that held that the site of the workplace determines the applicability of the ADEA include *S.F. Deyoreo v. Bell Helicopter Textron, Inc.*, 785 F.2d 1282 (5th Cir. 1986); *Zahourek v. Arthur Young and Co.*, 750 F.2d 827 (10th Cir. 1984); *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121 (D.C. Cir. 1985); and *Thomas v. Brown & Root, Inc.*, 745 F.2d 279 (4th Cir. 1984).

Congress amended the ADEA in 1984[8/] to protect United States citizens working for American corporations outside of the territorial United States. Congress accomplished this by broadening the definition of "employee" to include "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." § 11(f), 29 U.S.C. § 630(f).

While acknowledging that these amendments expanded the ADEA's coverage, the Fourth Circuit stated that "[n]otably missing from the 1984 amendments . . . is any provision regulating the conduct at issue here." App. A-5. Citing the canon of *expressio unis est exclusio alterius*, the Fourth Circuit concluded that the 1984 amendments "demonstrated that 'when it desires to do so, Congress knows how to' expand 'the jurisdictional reach of a statute.'" *Id.* (citing *EEOC v. Arabian American Oil Co.*, 499 U.S. at 258).

The Fourth Circuit's conclusion cannot be justified using this canon. As this Court has stated, "such canons 'long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose.'" *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983) (quoting *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943). Allowing U.S. employers to avoid the prohibitions of the ADEA when recruiting and hiring abroad would undermine the purpose of the ADEA to "promote employment of older persons based on their ability, rather than age; [and] to prohibit arbitrary age discrimination in employment." 29 U.S.C. § 621(b).

Moreover, the Fourth Circuit's conclusion that Congress affirmatively chose not to protect foreign nationals applying for employment in the United States when it amended the ADEA in 1984 is based on the erroneous assumption that Congress did not consider "the site of the

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[8/] Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802, 98 Stat. 1767, 1792 (1984).

workplace" as the appropriate test for extraterritoriality. Congress was well aware of the case law that had focused on the location of the work site as the determinative factor for assessing extraterritoriality in employment discrimination cases.[2/] Congress did not need to amend the ADEA to protect foreign nationals applying abroad for jobs in the United States. They were already protected.

The purpose of the 1984 amendment was to give the ADEA limited extraterritorial reach where previously there had been none. Prior to 1984, if the workplace or the prospective workplace was *outside the United States*, the ADEA did not apply regardless of the citizenship of the plaintiff. Now, if the workplace is outside the United States, the ADEA does apply if the plaintiff is a U.S. citizen and the defendant is a U.S. corporation. However, the 1984 amendment did nothing to alter the analysis when the workplace *is within the United States*. Both before and after the 1984 amendment, the ADEA applies, regardless of the citizenship of the plaintiff, when the workplace or prospective workplace is in the United States.

Both before and after the 1984 amendments, the critical coverage factor has always been the location of the workplace. Indeed, "[f]ollowing the passage of the 1984 amendments, the focus on the plaintiff's work site derives directly from the language of the statute: an 'employee' is defined to include United States citizens employed 'in a workplace in a foreign country.' 29 U.S.C. § 630(f)." *Denty v. SmithKline Beecham Corp.*, 907 F. Supp. 879, 884 (E.D. Pa. 1995), *aff'd*, 109 F.3d 147 (3d Cir.), *cert. denied*, 522

2/ *See Age Discrimination and Overseas Americans: Hearing Before the Subcomm. on Aging of the Sen. Comm. on Labor and Human Resources*, 98th Cong. 1 (1983) (statement of Sen. Grassley, Chairman, Sen. Subcomm. on Aging of the Sen. Comm. on Labor and Human Resources).

U.S. 820 (1997).[10] The term "workplace" in the text of the amendment brings the "work station" concept directly into the ADEA's coverage provisions. The ADEA also contains provisions stating that the statute does not protect "an employee in a *workplace* in a foreign country, [where] compliance with [the ADEA] would cause such employer . . . to violate the laws of the country in which such *workplace* is located." 29 U.S.C. § 623(f)(1) (emphasis added).[11] Thus, the plain language of the ADEA demonstrates that Congress envisioned the location of the workplace as the deciding factor for determining whether a case invokes the extraterritorial application of the ADEA. *See Belanger v. Keydril Co.*, 596 F. Supp. 823, 825 n.1 (E.D. La. 1984), *aff'd without opinion*, 772 F.2d 902 (5th Cir. 1985) ("If Congress believed that the situs of the employer's decision was the determining factor, then it would have clearly said so. Instead Congress believed that the workplace of the employee should be the determining factor.").

In holding that Reyes-Gaona's claim that he was denied employment at a workplace in the United States based on his age requires the ADEA to be applied extraterritorially, the Fourth Circuit rejects the "site of the workplace" test embraced by all other courts ruling on extraterritoriality of

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[10] Prior to the 1984 amendment, courts focused on the site of the workplace to determine whether a claim raised extraterritoriality concerns "based in part on language in § 7 of the ADEA, 29 U.S.C. § 626, which prescribes enforcement procedures by reference to certain provisions of the Fair Labor Standards Act (FLSA) . . . Those FLSA provisions specify that the FLSA does not apply 'with respect to any employee whose services during the workweek are performed in a workplace within a foreign country.' 29 U.S.C. § 213(f)." *Morelli v. Cedel*, 141 F.3d 39, 42 (2d Cir. 1998).

[11] Since it had expanded the scope of the ADEA to include U.S. citizens working abroad, Congress added § 623(f)(1) because it "was cognizant of the well-established principle of sovereignty . . . that no nation has the right to impose its labor standards on another country." S. Rep. No. 98-467, 27 (1984), reprinted in 1984 U.S.C.C.A.N.N. 2974, 3000.

U.S. employment laws. For example, in *Lopez v. Pan Am World Servs.*, the Eleventh Circuit held that the ADEA did not apply to a U.S. company's decision not to hire a U.S. citizen for a position in Venezuela, even though the interview and the company's hiring decision both took place in the United States. 813 F.2d 1118 (11th Cir. 1987). In an attempt to escape having his age discrimination claim barred on extraterritorial grounds, Lopez emphasized that "all of the acts relevant to the age discrimination charge occurred in the United States. . . ." *Id.* at 1119. The Eleventh Circuit rejected this argument:

> Appellant emphasizes that in this case a United States corporation decided in the United States not to hire a United States citizen. Appellant disregards the fact that his job would have been in Venezuela. To avoid the ADEA's extraterritorial exemption, appellant attempts to distinguish between the place of hiring and the place of termination. Such a distinction appears to be a restatement of the "place of decision" theory. Under this theory, the place the personnel decision is made determines whether the ADEA is applicable . . . "It is not the place where the plaintiff is hired, however, nor even the place where the termination decision is made that determines the applicability of the ADEA . . . Instead, it is the location of the 'work station' that is determinative."

Id. at 1119-20 (quoting *Wolf v. J.I. Case Co.*, 617 F. Supp. 858, 863 (E.D. Wisc. 1985)).

The Third Circuit has also refused to apply the "place of decision" theory. In *Cleary v. U.S. Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984), the Third Circuit rejected the argument by the plaintiff, a U.S. citizen working in London, that because the decision to terminate him was made in New York, his age discrimination claim did not depend on the extraterritorial application of the ADEA. Focusing on

§ 213(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, which prohibits extraterritorial application and is incorporated by § 7 of the ADEA, 29 U.S.C. § 626, the Third Circuit emphasized that the plain language of the statute, "looks to the place of employment, not the place where the decision was made." *Cleary*, 728 F.2d at 610 n.6.

In a more recent case, *Denty v. SmithKline Beecham Corp.*, 109 F.3d 147 (3d Cir.), *cert. denied*, 522 U.S. 820 (1997), the Third Circuit maintained its reliance on the site of the workplace over the place of decision when determining whether to apply the presumption against extraterritoriality in an ADEA case. In *Denty*, the court analyzed the question of whether the ADEA applied to the denial of a promotion based on age to a U.S. citizen working in the United States, where the promotion would have been to a position outside the United States. Agreeing with the district court that "'[t]he relevant work site is the location of [the position for which the plaintiff applied], not the location of Denty's employment at the time of the alleged discrimination,'" *Id.* at 149, (quoting *Denty v. SmithKline Beecham Corp.*, 907 F. Supp. at 884), the Third Circuit concluded that the ADEA did not apply.

The Seventh Circuit has also held that it is the location of the plaintiff's "work station" that determines coverage under the ADEA. In *Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985), the court held that because the plaintiff, a U.S. citizen "was employed overseas" at the time he was terminated, "this made his work station foreign and deprived him of the protections of the [ADEA]." *Id.* at 559.

As with the circuit court cases, every district court faced with the decision of whether or not a claim requires it to apply the ADEA or other employment discrimination statute extraterritorially, has looked to the site of the workplace. In *Hartman v. Wick*, 678 F. Supp. 312 (D.D.C. 1988), a Title VII case, the court held that the employment discrimination class could include nonresident aliens who applied for jobs to be performed in the United States. The defendant in *Hartman* asked the court to interpret the provision in Title VII that explicitly excludes aliens employed

"outside any State," 42 U.S.C. § 2000e-1, to exclude those class members who were neither citizens nor residents of the United States when they applied for employment within the United States. 678 F. Supp. at 325. After beginning its analysis by emphasizing that "courts must give the language of civil rights statutes 'broad and inclusive effect,' and must extend their coverage to the outer limits permitted from a fair reading of the statute. . . .,'" *id.*, (quoting Sutherland Stat. Const. § 74.05 (4th ed)), the court concluded that "in light of the plain language of the statute, the silent legislative history, and accepted rules of statutory construction, . . . Title VII applies to non-resident aliens who apply for employment within the United States." *Id.*

In another hiring discrimination case under the ADEA, *Hu v. Skadden, Arps, Meagher & Flom, LLP*, 76 F. Supp. 2d 476 (S.D.N.Y. 1999), *vacated and remanded on other grounds*, 214 F.3d 371 (2d Cir. 2000), the plaintiff, a Chinese citizen residing in the United States, was applying for a position with the defendant's Beijing or Hong Kong offices. The court concluded that Hu's claim "clearly calls for extraterritorial application of the ADEA because the job which the plaintiff sought was to be performed in Beijing and Hong Kong. The ADEA would apply to Hu, as a non-citizen, *only if he sought to work in the United States.*" *Id.* at 477 (emphasis added). Citing *Denty*, for the principle that "the place where the job is to be performed constitutes the location of the work site for ADEA purposes," *id.*, the *Hu* court held that "[t]he fact that Skadden conducted employment interviews in New York and may have made hiring decisions in New York does not suffice to render the employment within the United States for ADEA purposes." *Id.*

In *Wolf v. J.I. Case Co.*, 617 F. Supp. 858 (D.Wis. 1985), the court ruled that the ADEA was not applicable to a U.S. citizen's claim that he was terminated from his position in France. In response to the plaintiff's argument that his original employment contract with the defendant "was entered into in the United States and not abroad," *id.* at 862, and that he "was originally hired by the defendant in the United States," *id.* at 863, the court emphatically responded:

> It is not the place where the plaintiff is hired, however, nor even the place where the termination decision is made that determines the applicability of the ADEA. Instead, it is the location of the "work station" that is determinative.

Id. (internal citations omitted).

In allowing the plaintiff's claim that he had been discriminated against based on his age to go forward, the court in *Sharkey v. Lasmo (AUL LTD)*, 992 F. Supp. 321 (S.D.N.Y. 1998), declared that "[t]he pertinent inquiry is . . . the location of the prospective work site." *Id.* at 326. The *Sharkey* court continued by noting that "While the [Second Circuit] has yet to consider the issue, courts in other circuits have held that 'the relevant work site is the location of the[] position [offered], [and] not the location of [the plaintiff's] employment at the time of the alleged discrimination.'" *Id.* (quoting *Denty*, 907 F. Supp. at 881 & n4 and *Lopez*, 813 F.2d at 1120).

In *O'Loughlin v. The Pritchard Corp.*, 972 F. Supp. 1352 (D. Kan. 1997), the plaintiff, a non-citizen, had applied for positions both within the United States and overseas. The court ruled that although the ADEA did not apply to the defendant's failure to assign the plaintiff to positions outside the United States, it did apply to the plaintiff's claim that the defendant failed to hire him for "work within the United States." *Id.* at 1362-66.

Moreover, even in cases involving ambulatory employees, courts have gone to elaborate efforts to determine the true location of the workplace. For example, in *Gantchar v. United Airlines, Inc.*, 1995 U.S. Dist. LEXIS 3910 (N.D. Ill. March 28, 1995), in determining whether a refusal-to-hire claim by flight attendants under Title VII or the ADEA implicates the presumption against the extraterritorial application of federal statutes, the court held that the "primary focus must be on the location of plaintiffs' potential employment." 1995 U.S. Dist LEXIS 3910 at *21. *See also*

Hodgson v. Union de Permisionarios Circulo Rogo, S. de R.L., 331 F. Supp. 1119, 1121-22 (S.D. Tex. 1971) (in a case involving Mexican employees who drove buses between Mexico and Texas, the court held that where the majority of work was performed in Mexico, the FLSA was inapplicable because of the presumption against extraterritoriality).

Finally, the policy concerns that form the basis for the presumption against extraterritoriality do not support the Fourth Circuit's decision that when U.S. employers go abroad to recruit and hire workers to perform work in the United States, their actions are not covered by the ADEA. The presumption in part "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963). There are no such concerns in requiring a U.S. employer to comply with U.S. employment discrimination laws when recruiting and hiring individuals for jobs that will be performed within the United States.

The presumption is also "based on the assumption that Congress is primarily concerned with domestic conditions." *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949). Although the Fourth Circuit considered Reyes-Gaona's claim to be "attenuated" to "the territorial jurisdiction of the United States," App. A-5 (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. at 244), the focus of this case is clearly domestic. It involves U.S. employers hiring workers to perform work entirely in the United States. A federal temporary employment visa program, the H-2A program, is central to the case. Under the H-2A program, the federal government will permit U.S. employers to employ foreign workers on a temporary basis only after the employer certifies that there is a domestic labor shortage and that employing foreign workers will not adversely affect the wages and working conditions of similarly employed American workers. 8 U.S.C. § 1188(a)(1); App. A-2.

The only arguably "extraterritorial" feature of Reyes-Gaona's claim is that he was in Mexico when he applied for

the employment that would have been performed in the United States.[12/] "Without more, this cannot suffice to push the controversy beyond [the court's] jurisdictional reach." *Independent Union of Flight Attendants v. Pan Am World Airways, Inc.*, 923 F.2d 678, 685 (9th Cir. 1991). "Because the hiring of foreign nationals might curtail jobs available for [American workers,]" *id.*, and because the work would be performed entirely in the United States for U.S. employers, Reyes-Gaona has stated a claim under the ADEA.

Applying the ADEA whenever the workplace or prospective workplace is in the United States regardless of where the application is made, will still give the ADEA a purely domestic focus and is entirely consistent with this Court's instruction that "legislation of Congress . . .is meant to apply only within the territorial jurisdiction of the United States." App. A-3 (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. at 248). Applying the ADEA whenever the work- place or prospective workplace is in the United States ensures that the ADEA will continue to prohibit discrimination based on age for jobs performed in the United States even as our nation's sources of labor extend to other countries. The Fourth Circuit's decision conflicts with congressional intent in enacting and amending the ADEA, and with the decisions of all other circuits that have considered the issue of extraterritoriality under the ADEA and similar statutes.

[12/] Indeed, if Reyes-Gaona had not been in a foreign country, he would not have been eligible for the H-2A program. The fundamental premise of the H-2A program is that foreign nationals are recruited in their home country by U.S. employers for employment in the United States. Only after the applicant is selected will the employer arrange for the issuance of the temporary visa which enables the individual to enter the United States.

II. THE FOURTH CIRCUIT'S DECISION CREATES THE POTENTIAL FOR UNDERMINING ENFORCEMENT OF THE ADEA AND OTHER FEDERAL CIVIL RIGHTS LAWS AS THEY APPLY TO THE INCREASINGLY GLOBAL LABOR MARKET FROM WHICH EMPLOYERS RECRUIT WORKERS FOR THEIR U.S. OPERATIONS.

The Fourth Circuit's decision has enormous potential impact on the implementation of federal employment discrimination laws and the increasing efforts by U.S. employers to use federal employment visa programs to recruit and to hire citizens of other nations to fill jobs in the United States. The Fourth Circuit's language could be construed to restrict regulation of discriminatory recruiting practices prohibited by U.S. law based on age, as well as gender, race, color and religion. In *Reyes-Gaona*, the Court essentially gave U.S. employers permission, when recruiting foreign workers abroad for work to be performed entirely in the United States, to discriminate with impunity. The discriminatory employment practices allowed by the lower court's decision could markedly affect the character of the labor force in the United States.

The Immigration and Nationality Act contains several federal visa programs that approve and facilitate the process of U.S. employers going abroad to recruit and hire foreign nationals to work in the United States in temporary or seasonal jobs. Among these programs are the H-2A temporary foreign agricultural worker program , the H-2B program for non-agricultural workers, and the H-1B program for "specialty occupations." All three of these programs are premised on a shortage of available, qualified U.S. citizens or lawful permanent resident immigrants, to whom the ADEA and all other U.S. employment discrimination statutes apply. 8 U.S.C. § 1188 (a)(1); *see* 8 U.S.C. §§ 1182(n)(1)(A) and (G)(i)(I). These programs also require that employment of aliens in such labor "will not adversely affect the ... working conditions of workers in the United States similarly employed." 8 U.S.C. §§ 1188(a)(1)(B); 1182(n)(1)(A)(ii).

The first program, the federal H-2A visa program, is central to Reyes-Gaona's case. The H-2A program allows agricultural employers in the United States to hire foreign workers to perform farmwork in the United States on a temporary basis if – after interstate recruitment efforts within the United States – it appears that insufficient U.S. workers are available. Temporary foreign-national farmworkers are known as "H-2A workers" after § 101(a)(15)(H) (ii)(a) of the Immigration and Nationality Act of 1952, as amended in 1986 by the Immigration Reform and Control Act (IRCA). They are also known as "guestworkers" because they hold "non-immigrant" status. H-2A workers do not acquire rights to live or work in the United States beyond temporary employment for a particular employer, but instead must return to their home country at the end of their employment in the United States, which may not exceed 11 months. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184, 1188; 20 C.F.R. §§ 655.90-655.112 (Department of Labor Employment and Training H-2A implementation regulations); 29 C.F.R. Part 501 (DOL Wage and Hour Division H-2A enforcement regulations); 8 C.F.R. § 214.2(h) (Immigration and Naturalization Service regulations on temporary non-immigrant visas). *See generally Saxbe v. Bustos*, 419 U.S. 65 (1974); *Alfred L. Snapp & Sons v. Puerto Rico*, 458 U.S. 592 (1982).

The H-2B program is for non-agricultural temporary foreign workers. Two groups of U.S. employers that use the H-2B program are forestry contractors that plant trees for major paper companies and east coast seafood packers, both of whom are classified for this purpose as "non-agricultural." 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 20 C.F.R. §§ 655.1-655.5.

Perhaps the most well-known temporary work visa program, "H-1B," was created by Congress in 1990. Under the H-1B program, U.S. employers may temporarily (for up to six years) fill needs with foreign workers in "specialty occupations ... requiring theoretical and practical application of a body of specialized knowledge and the attainment of a bachelor's or higher degree (or its equivalent) in the specific specialty." 8 U.S.C. §§ 1101(a)(15)(H)(i)(b); 1182(m); 1184(i); and (n). U.S. General Accounting Office, "H-1B

Foreign Workers: Better Controls Needed to Help Employers and Protect Workers," Report No. GAO/HEHS-00-157, Sept. 7, 2000, at 3.

Above all, the Fourth Circuit in *Reyes-Gaona* worried – absent evidence to such effect supplied by any party or data gleaned from any cited source – that "[e]xpanding the ADEA to cover millions of foreign nationals who file an overseas application for U.S. employment could exponentially increase the number of suits filed and result in substantial litigation costs." App. A-7. Yet both key premises of this assertion are highly questionable. Moreover, they apparently are relevant only to *disappointed* H-2A program applicants; as the concurring opinion below noted: "Had Reyes-Gaona been hired ... once he began work in this country, the ADEA would have protected him from employment discrimination." App. A-9-10.

There is simply no basis for the Fourth Circuit's conclusion that rejected applicants to programs such as H-2A number in the "millions." App. A-7. Most of these programs are subject to specific, annual, numerical limits, as well as complex and varied eligibility rules, which further restrict the number of potential beneficiaries. While there is no specific limit on the number of H-2A visas that may be issued each year, in fiscal year 2000, the number of jobs which agricultural employers sought to fill with H-2A guestworkers was 48,480 and the number of jobs approved reached 44,017. U.S. Department of Labor, Employment and Training Administration, "H-2A Summary Report," in OWS Information Bulletin No. 03-01 (January 3, 2001), at ii. By contrast, the average annual number of approvals during 1989-91 was about 26,000 and during 1992-1994, about 17,500. Congressional Research Service, *Immigration: The "H-2A" Temporary Agricultural Worker Program,* No. 97-714 EPW updated Aug. 4, 1998. The H-2B program only allows up to 66,000 visas to be issued each year. 8 U.S.C. § 1184(g)(1)(B). Under the H-1B program, up to 195,000 visas may be issued per year through 2003. 8 U.S.C. § 1184(g)(1)(A).

Moreover, the H-2A recruitment process abroad typically is controlled by employers and does not include widespread solicitation of applicants. It follows that total foreign national applicants – and in particular, disappointed applicants -- for the positions at issue in this case almost certainly never have numbered in the "millions." App. A- 7.

Second, the suggestion that the relief sought by the Petitioner inevitably will generate a flood of expensive litigation is based on no factual record whatever, and further, ignores the statutory and administrative framework and factual information. For instance, such problems could be obviated by employer compliance with the ADEA in foreign recruiting (for jobs at U.S. work sites) consistent with practices presumably followed by the same employers seeking U.S. workers to fill the same jobs. Further, administrative and judicial procedures currently applicable to potential claimants such as Reyes-Gaona are extensive; for instance, among other agency, regulatory and statutory requirements, such claimants would be required to file a timely charge of discrimination against the appropriate employer(s) with the EEOC in the United States. Further, logistical impediments for potential claimants who are foreign worker applicants residing overseas are and would be formidable (*e.g.*, including engaging counsel licensed to practice in the United States).

The danger of temporary visa programs undermining worker rights is a serious one, recognized by Congress, and also the subject of many and various worker complaints. For instance, reports recently have appeared of allegations of discrimination by American workers concerning the impact of the H-1B program,[13/] particularly with regard to age.[14/]

[13/] *See, e.g.*, Carrie Kirby, *H-1B Leaves Minority Workers on Sidelines, Groups Say*, SAN FRANCISCO CHRONICLE, Oct. 19, 2000, at B1.

[14/] In response to competing concerns and testimony from employers and displaced workers, Congress asked[the National Academy of Science's Committee on Workforce Needs in Information Technology to examine

(continued...)

Other reports have arisen to the effect that improper motivations lead some U.S. employers to create artificial labor shortages to avoid hiring U.S. workers in favor of foreign workers who may be more willing to tolerate low wages and other injustices under the realistic fear that if they protest, they will be fired and deported immediately.[15] The Fourth Circuit's *Reyes-Gaona* decision simply adds another inflammatory element to this mix, by creating opportunities – and thus strong incentives – for employers to ignore U.S. employment discrimination laws. Because selective hiring practices conducted overseas under the H-2A, the H-1B, and other federal programs will be off limits to civil rights scrutiny, the Fourth Circuit's decision will encourage discrimination by those employers inclined to discriminate.

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[14](...continued)
the existence and extent of age discrimination among information technology workers. *See* National Research Council, Committee on Workforce Needs in Information Technology, *Building a Workforce for the Information Economy* (2001). *See also* Joyce Lain Kennedy, *Talent Overlooked in Youth, H-1B Era*, THE DALLAS MORNING NEWS, Aug. 13, 2000, at 1L.

[15] *See, e.g.*, Kevin Sack, *Facing a Teacher Shortage, American Schools Look Overseas*, THE NEW YORK TIMES, May 19, 2001, at A-8 ("Some education experts also say the availability of teachers abroad my reduce pressure on governments to address the teacher shortage with pay increases and other benefits."); Jessica Kowal, *Levy Seeks to Hire Foreign Teachers*, NEWSDAY, May 9, 2001, at A14 (reporting that in response to local school board's announcement of plan to hire as many as 800 foreign teachers, United Federal of Teachers' president protested that "the board should stop spending money on foreign trips and lawyers and solve what she sees as the root of a teacher shortage: low salaries."); Robert E. Pierce, *For N.C. Tobacco Farmers, Guest Workers a Success*, WASHINGTON POST, Aug. 13, 2001, at A3; Barry Yeoman, *Silence in the Fields*, MOTHER JONES (Jan.-Feb. 2001); Leah Beth Ward, *Desperate Harvest*, (series, Oct. 30-Nov. 1, 1999) (http://www.charlotte.com/observer/special/immigrant/1031fuentes.htm).

The Fourth Circuit's decision does not reflect the realities and complexities of an increasingly global marketplace for labor. More and more U.S. employers, private and public, respond to domestic labor shortages by seeking workers outside the U.S.[16/] These employers, as well as their current and potential employees, need guidance from this Court as to their rights and responsibilities when they recruit and hire abroad for domestic employment. They should not have to guess whether employment decisions must be justified based on where the job will be performed; where the applicant was when he or she applied for the position; or where the hiring decision was made. Instead, there should be one basic test for extraterritoriality under the ADEA. Employers need the predictability that the site of the workplace test provides. *See Oil, Chemical & Atomic Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 410, 417-19 (1976) (Texas right-to-work law does not apply, and thus, does not afford exemption from §14(b) of the National Labor Relations Act, with regard to "unlicensed seamen, who while hired in Texas and having a number of other contacts with the State, spend the vast majority of their working hours on the high seas"; "job situs test,"among other benefits, eliminates the "unpredictability"of having to evaluate workers' contacts to a jurisdiction).

The potential for anomalous consequences from the *Reyes-Gaona* decision also demonstrates the need for review by this Court. The Fourth Circuit's ruling seems to envision a standardized foreign recruiting process for H-2A and other

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[16/] *See, e.g.*, Bill Brubaker, *Hospitals Go Abroad to Fill Slots for Nurses*, WASHINGTON POST, June 11, 2001, at A1; Susan Snyder, *School Districts Nation Wide are Recruiting Abroad to Fill Vacancies*, PHILADELPHIA INQUIRER, March 29, 2001, Eric Schmitt, *To Fill Gaps, Cities Seek Wave of Immigrants*, THE NEW YORK TIMES, May 30, 2001, at A1; Anne Colden, *Immigrant Labor Bolsters State Employers Scrambling to Fill Positions Amid Record Worker Shortage*, THE DENVER POST, March 11, 2001, at J-04; Margaret Talev, *Tech Immigrants Boost Economy; Local Businesses Say They Couldn't Get By Without Foreign Workers*, THE LOS ANGELES TIMES, Dec. 18, 2000, at B-1.

temporary foreign workers, with the applicants' role being "[t]he simple submission of a resume abroad," App. A-7, and the employers' role being to conduct interviews (or some other review) abroad of persons "submit[ting] a job application in a foreign country." App. A-7. This does not account for other possibilities which have already become commonplace, at least in the context of the H-1B temporary worker visa program.

U.S. employers are receiving job applications over the Internet; and some employers make job announcements, and possibly even convey hiring decisions via the Internet.[17/] Other reports describe job interviews conducted by U.S. employers via "videoconferencing," with employer representatives located in the U.S. and job applicants located outside the United States, and with a meeting between the two occurring in both jurisdictions (or perhaps neither).[18/] These examples give rise to considerable doubt regarding the precise situs of "submission" of a job application and the hiring "decision." Thus, they call into question the Fourth Circuit's analysis based on where recruiting takes place and its rejection of the "situs of work" test.

It is troubling if, as the Fourth Circuit's decision implies, the mere fact that an applicant is physically located overseas when she or he applies for employment in the United States, permits U.S. employers to ignore the ADEA and related employment discrimination laws. *Reyes-Gaona* also appears to allow employers to decide which foreign national applicants will be permitted to work in the United States, perhaps alongside U.S. citizens, based on whether their skin

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[17/] *See, e.g.*, Connie Farrow, *U.S. Economy Slows But Resort Towns Still Seek Foreign Workers,* Associated Press, May 31, 2001; Carla Joinson, *"Want to Work in the United States?"* HR MAGAZINE, September 2000, vol. 45, iss. 9, at 54, *et seq.*

[18/] *See, e.g.*, Victor D. Infante, *Small World Gets Smaller; job fairs help recruit foreign high tech employees,* WORKFORCE (ACC Communications Inc.), February 1, 2001, No. 2, Vol.80, at 28.

is darker or lighter, what their religious affiliation is, whether they are male or female, or based on their age.

The Fourth Circuit's ruling treating as determinative the "location of the applicant" creates various other anomalies which were not adequately examined; just a few are offered here to suggest the need for further review by this Court. First, *if* the location of an applicant is determinative, then U.S. citizens recruited abroad for jobs in the United States – like foreign nationals – could be denied the ADEA's protections. Alternatively, *Reyes-Gaona* may mean that in the event of foreign recruiting by a U.S. employer in which interviewing is conducted – possibly contemporaneously – of both U.S. citizens (living abroad) and foreign nationals (presumably for positions for which some but not an adequate supply of U.S. applicants is available) the employer can decide to apply the ADEA and other U.S. employment discrimination laws only to one portion of the group being interviewed – the U.S. citizens – but not to the (perhaps equally qualified) remaining applicants who are foreign nationals.

Or suppose that Reyes-Gaona had been a lawful permanent resident alien of the United States, an immigrant of long standing, and during a brief trip to Mexico applied for the job in North Carolina and was rejected by the U.S. employer based on age. Under the Fourth Circuit's decision, the ADEA would not apply because he filed his job application abroad, but the ADEA would apply if he had filed his application for the same job while still in the United States. The impact on the job applicant, the impact on the employer, and the impact on the U.S. labor force would all have been the same regardless of where he was when he applied. Yet, the Fourth Circuit decision would deny protection under this country's employment discrimination laws under one scenario but not the other.

The *Reyes-Gaona* decision also raises the question about coverage for a lawful permanent resident alien who is employed in the United States by a U.S. employer, but travels abroad extensively and while traveling submits a job

application over the Internet to another U.S. employer in the United States. Under *Reyes-Gaona*, if the employer rejected the job application and resume, and refused to grant him an interview based solely on his age, would the ADEA not apply because a foreign national had applied for a job overseas?

Congress cannot have intended any of these regimes to be the law. Rather, these examples confirm the Court's wisdom in recognizing the advantages of a "job situs" rule in reviewing claims for exemption from the application of U.S. laws based on supposed harm attributable to their alleged extraterritorial application. *See Oil, Chemical & Atomic Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. at 417-19.

CONCLUSION

Based upon the foregoing, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Luis Reyes-Gaona	)	
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
North Carolina Growers Association, Incorporated; Del-Al Associates, Incorporated	)	**No. 00-1963**
	)	
Defendants-Appellees.	)	
	)	
Farm Labor Organizing Committee, AFL-CIO; Equal Employment Opportunity Commission,	)	
	)	
Amici Curiae.	)	

Appeal from the United States District Court
for the Middle District of North Carolina, at Durham.
N. Carlton Tilley, Jr., Chief District Judge.
(CA-00-93-1)

Argued: April 5, 2001

Decided: May 22, 2001

Before WILKINSON, Chief Judge, MOTZ, Circuit Judge, and Patrick M. DUFFY, United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by published opinion. Chief Judge WILKINSON wrote the opinion, in which Judge DUFFY joined. Judge MOTZ wrote an opinion concurring in the judgment.

OPINION

WILKINSON, Chief Judge:

This case requires us to decide whether the Age Discrimination in Employment Act (ADEA) covers foreign nationals who apply in foreign countries for jobs in the United States. We hold that the Act does not cover such persons. We thereby affirm the judgment of the district court, albeit on different grounds.

I.

Plaintiff Luis Reyes-Gaona is a Mexican national over the age of 40. Defendant North Carolina Growers Association (NCGA) is an American corporation that assists agricultural businesses in North Carolina in securing farm labor through the federal H-2A agricultural worker program.[1/] Defendant Del-Al is an agent of NCGA that recruits H-2A workers for NCGA and its members. In May 1998, Reyes-Gaona went to a Del-Al office in Mexico and asked to be placed on a list of workers seeking employment in North Carolina via the H-2A program. Del-Al told Reyes-Gaona that NCGA would not accept workers over forty years old unless that person had worked for NCGA before. Reyes-

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[1/] Agricultural employers who anticipate a labor shortage for temporary or seasonal jobs may petition the government for permission to employ foreign workers on a temporary basis pursuant to the H-2A visa program. 8 U.S.C. § 1101(a)(15)(H)(ii)(a). Before the Immigration and Naturalization Service will approve an application, the employer must certify that there is a domestic labor shortage and that employing foreign workers will not adversely affect the wages and working conditions of similarly employed American workers. *Id.* § 1188(a)(1).

Gaona filed suit against NCGA and Del-Al, alleging age discrimination in violation of the ADEA.

As the district court noted, an ADEA plaintiff must prove, *inter alia*, that he was qualified for the job he sought. Under Fourth Circuit precedent, for a foreign national to be "qualified" for a position, he must be authorized for employment in the United States at the time in question. *See Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 187 (4th Cir. 1998) (en banc) (per curiam). The district court granted defendants' Rule 12(b)(6) motion to dismiss because it was undisputed that Reyes-Gaona was not authorized to work in the United States at the time he sought employment with NCGA. In reaching this decision, the district court declined to address the threshold argument that the presumption against extraterritoriality barred the application of the ADEA to this case. Reyes-Gaona appeals.

II.

Plaintiff is a foreign national who applied in a foreign country for work in the United States. Accordingly, we begin, as we must, by acknowledging the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (*quoting Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). This interpretive canon is an especially important one as it "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Id.* Thus, the presumption against extraterritorial application of a federal statute can be overcome only if there is an "affirmative intention of the Congress clearly expressed." *Id.* (*quoting Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)). Since this determination is necessarily "a matter of statutory construction," *Arabian*, 499 U.S. at 248, we begin with the text of the ADEA itself.

The ADEA makes it unlawful "for an employer" to "fail or refuse to hire" or "otherwise discriminate against any individual with respect to his compensation terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). The term "employer" means any company "engaged in an industry affecting commerce who has twenty or more employees" and includes the agents of such companies. *Id.* § 630 (b). The term "employee" means "an individual employed by any employer," and "includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." *Id.* § 630(f). Prior to 1984, the ADEA did not contain the language regarding U.S. citizens employed in foreign workplaces. To the contrary, Section 626(b) adopted language from the Fair Labor Standards Act (FLSA) excluding from coverage any individual "whose services during the workweek are performed in a workplace within a foreign country." *Id.* § 213(f).

Based on the exclusionary language adopted from the FLSA, many courts held that, before 1984, the ADEA had a purely domestic focus and did not cover American citizens working for American companies in foreign countries. *See, e.g., Thomas v. Brown & Root, Inc.*, 745 F.2d 279, 281 (4th Cir.1984) (per curiam).[2/] The presumption against the extraterritorial application of American laws required this result because absent a clear statement from Congress, the scope of American law is limited to "the territorial jurisdiction of the United States." *Arabian*, 499 U.S. at 244. Thus the presumption prevented the ADEA from regulating events

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[2/] Six other circuits reached the same conclusion. And although many of these decisions were handed down after 1984, each involved events that preceded the enactment of the 1984 amendments. *See Lopez v. Pan Am World Services, Inc.*, 813 F.2d 1118 (11th Cir. 1987); *S.F. DeYoreo v. Bell Helicopter Textron, Inc.*, 785 F.2d 1282 (5th Cir. 1986); *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121 (D.C. Cir. 1985); *Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985); *Zahourek v. Arthur Young & Co.*, 750 F.2d 827 (10th Cir. 1984); *Cleary v. U.S. Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984).

taking place in foreign countries even when they involved citizens of the United States. And the Act certainly could not have reached the even more attenuated situation of a foreign national applying in a foreign country for work in the United States.

In 1984, Congress partially closed this gap. Congress responded to the *Thomas* line of cases by amending the ADEA to give it limited extraterritorial application. The definition of "employee" was amended to include "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." 29 U.S.C. § 630(f). This new statutory language explicitly expanded the ADEA to prohibit U.S. companies from discriminating against U.S. citizens employed in foreign countries. Congress also included an accompanying provision outlawing such discrimination by subsidiaries of U.S. corporations. *See id.* § 623(h). The language was "carefully worded to apply only to citizens of the United States" who worked for a U.S. company or its subsidiary because Congress recognized that the "well-established principle of sovereignty" prohibited the United States from imposing "its labor standards on another country." *Denty v. SmithKline Beecham Corp.*, 109 F.3d 147, 150 (3d Cir. 1997) (*quoting* S.Rep. No. 98-467, at 27 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2974, 3000).

These amendments demonstrated that "when it desires to do so, Congress knows how to" expand "the jurisdictional reach of a statute." *Arabian*, 499 U.S. at 258. According to the *Arabian* Court, "after several courts had held that the ADEA did not apply overseas" Congress enacted a set of changes whose "expressed purpose . . . was to make 'provisions of the Act apply to citizens of the United States employed in foreign countries by U.S. corporations or their subsidiaries.'" *Id.* at 259 (*quoting* S. Rep. No. 98-467, at 2 (1984). Notably missing from the 1984 amendments, however, is any provision regulating the conduct at issue here. Congress explicitly gave the ADEA extraterritorial application with respect to certain U.S. citizens while simultaneously declining to extend coverage to foreign nationals like Reyes-Gaona. Nothing in the amendments

regulates age discrimination by U.S. corporations against foreign nationals in foreign countries. And the doctrine of *expressio unis est exclusio alterius* instructs that where a law expressly describes a particular situation to which it shall apply, what was omitted or excluded was intended to be omitted or excluded. Indeed, neither Reyes-Gaona nor the Equal Employment Opportunity Commission (EEOC) cites a case, and we can find none ourselves, where the ADEA was interpreted to reach a situation analogous to the case at bar. Thus, a faithful reading of the plain text of the statute, especially in light of the 1984 amendments, compels the conclusion that Reyes-Gaona's claim is not sustainable under the ADEA.

Reyes-Gaona and the EEOC disagree. They claim that this case does not require extraterritorial application of the ADEA because the job Reyes-Gaona applied for was in the United States.[3/] The crux of their argument is that when determining whether a suit requires extraterritorial application of the ADEA, courts always look to the place of employment rather than the place where the decision was made. Because Reyes-Gaona applied for a job in the United States, they argue, the presumption against extraterritoriality is not implicated by this suit. In support they note that the ADEA itself contains the term "workplace." For example, "employee" is defined to include U.S. citizens employed "in a *workplace* in a foreign country." 29 U.S.C. § 630(f) (emphasis added). And the Act excepts from its reach employees "in a *workplace* in a foreign country" where compliance would conflict with the laws of the country "in which such *workplace* is located." *Id.* § 623(f)(1) (emphasis added).

[3/] Reyes-Gaona separately claims that the issue of extraterritoriality is not properly before this court because the district court did not address the issue below. This is wrong. It is axiomatic that "we may affirm the dismissal by the district court on the basis of any ground supported by the record even if it is not the basis relied upon by the district court." *Ostrzenski v. Seigel*, 177 F.3d 245, 253 (4th Cir.1999).

We are not persuaded. All of these statutory references come from the 1984 amendments to the ADEA which, as previously explained, do not cover Reyes-Gaona. Nothing in the ADEA provides that is shall apply anytime the workplace is in the United States regardless of the nationality of the applicant or the country in which the application was submitted. And the fact that the 1984 amendments refer to workplace does not mean that the Act focuses on work situs to the exclusion of the situs of the application or the nationality of the applicant. Indeed, the EEOC is insisting that the presumption against extraterritoriality has no applicability even when a foreign national submits a job application in a foreign country.

In addition to its statutory argument, the EEOC cites various decisions from the *Thomas* line of cases, *see supra* n. 2, all of which involved events that preceded the 1984 amendments. The EEOC claims these cases prove that courts look to the employee's actual or proposed work situs to determine whether the ADEA is being applied in an extraterritorial manner. This is not, however, what these cases demonstrate. As discussed above, the *Thomas* line of cases stands for the rather unremarkable proposition that before 1984 the ADEA had no extraterritorial application at all – not even for U.S. citizens working abroad for American companies. The fact that some suits were barred because of the international location of the employee's workstation says nothing about whether a foreign national can file suit under the ADEA merely because the proposed workstation is in the United States.

The simple submission of a resume abroad does not confer the right to file an ADEA action. Indeed, such a broad reading of the Act could have staggering consequences for American companies. Expanding the ADEA to cover millions of foreign nationals who file an overseas application for U.S. employment could exponentially increase the number of suits filed and result in substantial litigation costs. If such a step is to be taken, it must be taken via a clear and unambiguous statement from Congress rather than by judicial fiat.

III.

The Supreme Court has instructed the lower courts to take seriously the presumption against extraterritorial application of U.S. laws. In keeping with these instructions, many lower courts, including this one, held that the ADEA had no extraterritorial application prior to 1984. Congress responded by amending the Act to provide for limited extraterritorial reach. Since these amendments do not reach the case at bar, there remains nothing in the text of the ADEA to rebut the presumption against extending it to cover Reyes-Gaona. And the limited nature of the 1984 amendments indicates that foreign nationals in foreign countries are not covered by the ADEA, regardless of whether they are seeking employment in the United States or elsewhere.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

DIANA GRIBBON MOTZ, Circuit Judge, concurring in the judgment:

I concur in the judgment because I agree that no authority compels application of the ADEA to a situation, like that here, in which a foreign national applies in his home country for a job in the United States.

In support of their contention that they are not requesting extraterritorial application of the ADEA, Luis Reyes-Gaona and the EEOC rely on several cases in which courts have denied, on extraterritoriality grounds, the ADEA claims of legal aliens who applied in the United States for work abroad. *See Hu v. Skadden, Arps, Slate, Meagher & Flom LLP*, 76 F.Supp. 2d 476, 477 (S.D.N.Y. 1999) ("Although Hu conducted his job search in the United States, the employment he sought was to be performed outside the country. The fact that Skadden conducted employment interviews in New York and may have made hiring decisions in New York does not suffice to render the employment

within the United States for ADEA purposes."); *see also Denty v. SmithKline Beecham Corp.*, 109 F.3d 147, 150 n.5 (3rd Cir.1997) (denying claim of legal alien who applied in the United States for a position abroad on the ground that the place where the job is to be performed constitutes the location of the work site for ADEA purposes).

Reyes-Gaona and the EEOC argue that these authorities stand for the principle that courts look to the place of employment, not the place of the job application, in determining whether the ADEA reaches a given claim, or whether permitting the claim would require the extraterritorial application of the statute. In the case at hand, they maintain that the place of employment is the United States, so the ADEA applies to Reyes-Gaona's claim.

The authorities cited by Reyes-Gaona and the EEOC, however, do not present the same situation as this case; indeed, they present the reverse situation. Whereas the case at hand involves a foreign national applying outside the country for a position in the United States, those cases involved a foreign national applying in the United States for a position outside the country. The fact that the ADEA did *not* apply in those cases does not compel the conclusion that it *does* apply to this one. For this reason, I join in the judgment.

I emphasize that the decision reached by the court in this case does not conflict with the generally accepted principle that statutes affording protection from employment discrimination, such as Title VII and the ADEA, apply to foreign nationals who are legally employed in the United States. *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) ("We agree that aliens are protected under [Title VII]."); *Boureslan v. Aramco, Arabian American Oil Co.*, 892 F.2d 1271, 1273 (5th Cir.1990) (holding that Congress intended to "provide Title VII coverage to aliens employed *within* the United States"); *O'Loughlin v. The Pritchard Corp.*, 972 F.Supp. 1352, 1363-64 (D. Kan. 1997) (The ADEA "in general protects noncitizens of the United States from unlawful discrimination."). Had Reyes-Gaona been

hired by NCGA, once he began work in this country, the ADEA would have protected him from unlawful employment discrimination.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Luis Reyes-Gaona	)	
	)	
Plaintiff,	)	
	)	
v.	)	**1:00CV00093**
	)	
North Carolina Growers Association and Del-Al Associates, Inc.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

TILLEY, Chief Judge.

Plaintiff Luis Reyes-Gaona filed this action against Defendants North Carolina Growers Association ("NCGA") and Del-Al Associates, Inc. ("Del-Al") alleging violations of the Age Discrimination in Employment Act ("ADEA"), as amended, 29 U.S.C. § 621 et seq. This case is before the Court on Defendant Del-Al's Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, (Def. Del-Al's Mot. to Dismiss [Doc. # 7]), and on Defendant NCGA's Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, (Def. NCGA's Mot. to Dismiss [Doc. # 9]). For the reasons stated below, Defendants' motions are GRANTED. As there are no remaining claims, the case is DISMISSED.

I.

The facts, stated in the light most favorable to the Plaintiff, are as follows. Mr. Reyes-Gaona is a fifty-five-year-old man, a Mexican national, and a resident of Michoacan, Mexico. Defendant NCGA is a corporation that provides various services to its members, who are owners and operators of agricultural businesses in North Carolina. One of these services is assistance in securing foreign agricultural labor through the federal H-2A agricultural worker program.[4/] Defendant Del-Al is a corporation that recruits this foreign labor for Defendant NCGA and its members.

In May 1998, Mr. Reyes-Gaona went to the office of Cipriano Molina, an employee of Defendant Del-Al who is located in Mexico. Mr. Reyes-Gaona asked to be placed on the list of workers seeking employment in North Carolina under the H-2A program. According to Mr. Reyes-Gaona, Mr. Molina told him that NCGA would not accept an application from a worker who is over forty years old, unless the person had worked for NCGA before.

II.

Mr. Reyes-Gaona then filed this lawsuit alleging that the Defendants had violated the ADEA. Defendants have moved to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

[4/] The H-2A program establishes a means for American employers, who anticipate a shortage of domestic agricultural labor, to apply for permission to recruit and employ foreign workers to perform agricultural labor or services of a temporary or seasonal nature in the United States. Before the Immigration and Naturalization Service ("INS") will approve an employer's application for such workers, the employer must certify that there are not sufficient domestic workers who are able, willing, qualified, and available. The employer must also certify that the employment of the foreign workers will not adversely affect the wages and working conditions of similarly employed American workers.

In ruling on a Rule 12(b)(6) motion, the allegations in the complaint are assumed to be true, and "the facts and reasonable inferences derived therefrom" are construed in the light most favorable to the plaintiff. Ibarra v. United States, 120 F.3d 472, 474 (4th Cir.1997). Viewing the complaint in the light most favorable to the plaintiff, the court should not dismiss the case unless it appears certain that the plaintiff can prove no set of facts that would entitle him to relief. See Mylan Labs., Inc., v. Matkari, 7 F.3d 1130, 1134 (4th Cir.1993).

A.

The Defendants first argue that Mr. Reyes-Gaona cannot establish a prima facie case of discrimination under ADEA because he was not qualified for employment.[5/] When the applicant is a foreign national, the Fourth Circuit has held that "being 'qualified' for the position is not determined by the applicant's capacity to perform the job - rather, it is determined by whether the applicant was an alien authorized for employment in the United States at the time in question." Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, 187 (4th Cir.1998) (en banc) (per curiam). See also Chaudhry v. Mobil Oil Corp., 186 F.3d 502, 504 (4th Cir.1999).

The plaintiff in Egbuna, a Nigerian national, sued his former employer under Title VII, alleging that the employer had refused to rehire him in retaliation for his having participated in another employee's discrimination suit. See Egbuna, 153 F.3d at 185. Because his visa had expired, the plaintiff was not authorized to work in the United States at the

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[5/] To establish a prima facie case of age discrimination, a plaintiff must prove that (1) he is a member of the protected class, that is, he is at least forty years old; (2) he was qualified for a job for which the employer was seeking applicants; (3) he was rejected despite his qualifications; and (4) the position remained open and the employer continued to seek or accept applications from persons with his qualifications outside the protected class. See Henson v. Liggett Group, Inc., 61 F.3d 270, 274 (4th Cir.1995)

time that he approached his former employer about being rehired. See id. The Fourth Circuit found that the plaintiff had no cause of action against his employer because "his undocumented status rendered him ineligible both for the remedies he s[ought] and for employment within the United States." Id. at 186. The Fourth Circuit held that it could not allow a cause of action because

> [t]o do so would sanction the formation of a statutorily declared illegal relationship, expose [the employer] to civil and criminal penalties, and illogically create an entitlement simply because [the Nigerian national] applied for a job despite his illegal presence in this country and despite his having been statutorily disqualified from employment in the United States. In this instance, to rule [the Nigerian national] was entitled to the position he sought and to order [the employer] to hire an undocumented alien would nullify [the Immigration Reform and Control Act of 1986], which declares it illegal to hire or to continue to employ unauthorized aliens.

Id. at 188.[6/]

Similarly, at the time that Mr. Reyes-Gaona applied for the job with NCGA, Mr. Reyes-Gaona was not authorized to work in the United States. Had he been offered the job, he would have had to obtain an H-2A visa. Obtaining such a visa is not a foregone conclusion after the application is made. Among other things, the applicant for the visa must not have violated any conditions of entry into the United States within

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[6/] The Fourth Circuit then applied this rule in Chaudhry v. Mobil Oil Corp., 186 F.3d 502, 504 (4th Cir.1999), where the plaintiff brought an action under ADEA.

the past five years. See 8 U.S.C. § 1188(f)[7]; 8 C.F.R. § 214.2(h)(5)(viii)(A)[8]. If the applicant has held H-2A status for three years without interruption, then the applicant must remain outside of the United States for an uninterrupted period of six months before he or she may obtain a visa. See 8 C.F.R. § 214.2(h)(5)(viii)(C). The applicant must fully and truthfully disclose any information requested by the INS. See 8 C.F.R. § 214.1(f). The applicant must not have been convicted within the United States of a crime of violence for which a sentence of more than one year imprisonment may have been imposed, without regard to the length of sentence that was actually imposed. See 8 C.F.R.§ 214.1(g). Thus, it cannot be said with certainty that Mr. Reyes-Gaona would have received an H-2A visa.

Even if Mr. Reyes-Gaona were to show that he met the requirements for an H-2A visa, Egbuna still requires that this claim be dismissed. In Egbuna, at the time of the court's decision, the plaintiff had temporary work authorization. See id. at 186 n.4. Nevertheless, the court focused on whether the plaintiff was authorized for employment in the United States at the time of the alleged discriminatory action. Because Mr. Reyes- Gaona was not authorized to work in the United States at the time he met with Mr. Molina, Mr. Reyes-Gaona cannot show that the was qualified for employment.

Further, Mr. Reyes-Gaona, like the plaintiff in Egbuna, seeks an order compelling NCGA to hire him and to

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[7] This section provides that "[a]n alien may not be admitted to the United States as a temporary agricultural worker if the alien was admitted to the United States as such a worker within the previous five-year period and the alien during that period violated a term or condition or such previous admission." 8 U.S.C. § 1188(f).

[8] This section provides that "[a]n alien may not be accorded H-2A status who the Service finds to have violated the conditions of H-2A status within the prior five years. H-2A status is violated by remaining beyond the specific period of authorized stay or by engaging in unauthorized employment." 8 C.F.R. § 214.2(h)(5)(viii)(A).

provide him with back pay and benefits. For this Court to find that Mr. Reyes- Gaona is entitled to equitable or legal relief would be sanctioning an illegal relationship because Mr. Reyes-Gaona was not authorized to work in the United States at the time that he applied for the job. The Fourth Circuit refused to sanction such a relationship in Egbuna. Accordingly, because Mr. Reyes-Gaona cannot show that he was qualified for employment in the United States, Mr. Reyes-Gaona cannot state a claim under the ADEA.

B.

The Defendants also argue that they are not subject to suit by a foreign national who resides outside of the United States for alleged violations of the ADEA relating to an application for employment within the United States. The Defendants argue that the plain language of the ADEA bars Mr. Reyes-Gaona's suit and cite EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) (superseded by statute), for the principle that unless there is a clear statement by Congress to the contrary, there exists a strong presumption against extraterritorial application of United States laws. (Br. Supp. Def. NCGA's Mot. Dismiss [Doc. # 10] at 7 (citing Arabian Am. Oil, 499 U.S. at 253); Def. Del-Al's Br. Supp. Mot. Dismiss [Doc. #8] at 3 (citing Arabian Am. Oil, 499 U.S. at 249).) Because of the Court's holding that the Plaintiff is not "qualified" for the position, this argument will not be addressed.

III.

For the reasons stated, Defendants' motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure are GRANTED. As no further claims remain, it is ORDERED that this case be, and the same hereby is, DISMISSED.

This the 22nd day of June, 2000

United States District Judge

APPENDIX C

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the ADEA are codified at 29 U.S.C. §§ 621-634 as follows:

§ 623(a)(1) Prohibition of Age Discrimination

(a) *Employer practices*
It shall be unlawful for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

§ 623(f)(1) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization -

(1) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this subsection where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the county in which such workplace is located;

§ 630. Definitions

For the purposes of this chapter -

(f) The term "employee" means any individual employed by an employer except that the term "employee" shall not include any person elected to public office in any state or political subdivision on any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy-making level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employees" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country. (As amended by P.L. 98-459, eff. Oct. 9, 1984).